

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 25, 2006

STATE OF TENNESSEE v. ARMANDO RAMIREZ MARTINEZ

Direct Appeal from the Criminal Court for Davidson County
No. 2005-B-1096 Cheryl Blackburn, Judge

No. M2005-02856-CCA-R3-CD - Filed November 2, 2006

The Defendant, Armando Ramirez Martinez, appeals from the sentencing decision of the Davidson County Criminal Court. The Defendant was indicted for attempted first degree murder. He subsequently pled guilty to aggravated assault. Pursuant to the terms of the plea agreement, he received a six-year and one-month sentence, and the trial court was to determine the manner of service. Following a sentencing hearing, the trial court ordered that the Defendant's six-year and one-month sentence be served in the Department of Correction. On appeal, the Defendant argues that the trial court erred in denying an alternative sentence. Finding no error, we affirm the sentencing decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. McLIN, JJ., joined.

Emma Rae Tennent, Assistant Public Defender, Nashville, Tennessee (on appeal). Dawn Deaner, Nashville, Tennessee (at trial) for the appellant, Armando Ramirez Martinez.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Angelita Dalton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

A Davidson County grand jury returned an indictment against the Defendant charging him with attempted first degree murder. The Defendant subsequently pled guilty to aggravated assault,

a Class C felony. See Tenn. Code Ann. § 39-13-102.¹ The plea agreement provided that the sentence would be six years and one month² and that the manner of service would be submitted to the trial court.

The official version of the events contained in the presentence report summarizes the facts as follows:

On January 16, 2005, at approximately 2120 hours, Detective Joseph Winter responded to a shooting call at 318 Elberta Street #1. When the officer arrived on the scene, he spoke with Jose Quintana, the victim in this case. The detective found the victim sitting in the doorway and he had been shot in the left leg.

Med-Com arrived on the scene and transported the victim to Vanderbilt Hospital where he was treated for a gunshot wound in the hand, leg, and testicles.

Detective Winter was able to interview the victim at the hospital. The victim advised the officer that he had a friend named Tabitha that spent the night with him. The victim further stated that Tabitha's boyfriend, known only as "Alex" came over causing a disturbance and shot him. Mr. Quintana advised the detective that his neighbor, Raymond Chavis knew Tabitha and Alex.

Mr. Chavis advised the detective that his cousin, Leatha Raxter, used to date the subject known as Alex.

On January 17, 2005 detectives Tim Manson and Joe Winter went to CCA to interview Leatha Raxter about Alex. Raxter provided the detectives with the name of Alex Ramirez.

After interviewing Raxter, Detective Winter conducted a mugshot search and were [sic] able to find a subject by the name of Armando Ramirez Martinez [the Defendant]. Based on this information, Detective Winter prepared a photo line up which included the photograph of [the Defendant]. Mr. Quintana viewed this line up and was able to identify [the Defendant] as the person that shot him.

¹The trial court noted at the guilty plea hearing that aggravated assault was not a lesser included offense of attempted first degree murder. The Defendant agreed on the record and by written waiver that the indictment be amended to include aggravated assault.

²The Defendant agreed to a hybrid sentence with a Range II length of incarceration of six years and one month and a Range I release eligibility date, which is permissible under State v. Hicks, 945 S.W.2d 706, 709 (Tenn. 1997). The judgment form indicates that the plea involved a hybrid sentence pursuant to Hicks.

A sentencing hearing was held on October 14, 2005. The proof at the sentencing hearing established that the Defendant was twenty-two years old and moved to the United States from Mexico in May of 2002. He testified that he completed middle school in Mexico. The Defendant reported that, prior to his incarceration in January of 2005, he worked for "Oscar Romero" as a carpenter. He stated that he had held this position since January of 2003 and that he would be able to return to this position if released on probation. He also said that he had a place to live if released on probation. The Defendant also reported that, prior to this employment, he worked as a mechanic.

The presentence report reflects that the Defendant's criminal history includes convictions for reckless aggravated assault; criminal impersonation; reckless driving; attempting to purchase alcohol while under twenty-one years of age; driving while license suspended, cancelled, or revoked; and two convictions for violating the "driver's license law." He received a sentence of two years for the reckless aggravated assault. This sentence was "to serve[,] and then he was placed on determinate release, which he violated. Probation violation warrants were filed against the Defendant on May 19, 2004, and January 31, 2005. The Defendant reported that he had used marijuana, cocaine, and alcohol in the past.

Regarding the commission of the offense in this case, the Defendant admitted that he shot the victim. The Defendant stated that sometimes he would go downstairs and "have a few drinks" with the victim. According to the Defendant, he was informed by a friend that the victim, who used cocaine, wanted to take advantage of the Defendant's girlfriend, Tabitha. He testified,

Then I went quickly to the house, downstairs, when he told me that, and I started knocking on the door, and they didn't, they wouldn't open it.

. . . .

I knocked harder and I said if they didn't open it, I was going to break the door down.

. . . .

About ten minutes later, they opened the door. He opened the door and he had no shirt on. He was just in like boxers, boxer shorts, and my girlfriend had her blouse down and her pants were partly down.

. . . .

She was in the bed. I thought she had cheated on me, but, no, it is that she had taken a lot of pills and she fell asleep, and when I opened the door, I found her there in the bed.

According to the Defendant, his girlfriend would not wake up, and he had to “dump water” on her. The Defendant stated that Tabitha informed him that the victim had taken advantage of her.

The next day, the Defendant went to the victim’s apartment and shot him in the leg and groin. He stated that he was intoxicated at the time. According to the Defendant, another man named Oscar went to the victim’s apartment with him, and they fled the scene after the shooting. The Defendant testified that Oscar was not involved in the shooting. The Defendant was not arrested until “almost a month” later. According to the Defendant, his friend telephoned the police, but the police never arrived.

The Defendant stated that he had argued with his girlfriend the day he found her in the victim’s apartment, but he denied that he assaulted her.³ According to the Defendant, he did not know where Tabitha was, and he had no plans to resume a relationship with her if released on probation. He also stated, “I’ve thought I don’t want to drink anymore.” The Defendant testified that he understood he would not be permitted to use illegal drugs on probation.

At the conclusion of the sentencing hearing, the trial court imposed a sentence of total incarceration. The trial court found that the Defendant was not a favorable candidate for alternative sentencing, reasoning as follows:

[S]ome of the things I need to look at are the facts and circumstances and whether or not he used a firearm and all those various things, but with regard to sentencing considerations, there are three things I need to look at: whether confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct. Now he has a history. It is not necessarily that long.

It is necessary to avoid depreciating the seriousness of the offense. Probably not in this case; however, measures least [sic] restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant, and back on October 9, of ‘03, he pled guilty to reckless aggravated assault involving a weapon. That was to serve, so he was placed on determinate release for which he violated by not showing up.

I ordered him to serve 60 days, put him back on probation. He then violated again by not showing up, so I have in the past put him on probation. Basically, it would be three times; one by operation of law, and two by — well, one by letting him back out, so I have, in fact, previously tried him on probation, but I guess what is most troubling to me is this use of a gun by somebody who used a gun previously.

³The State attempted to locate Tabitha Johnson to testify. However, the State was unable to locate her and, therefore, unable to serve her with a subpoena. According to the assistant district attorney general, Tabitha filed a domestic violence report against the Defendant.

He is a convicted felon, shouldn't have a gun in the first place. I've tried him on probation, so for all those reasons, I'm going to not put him on probation, put the sentence into effect.

This appeal followed.

ANALYSIS

The Defendant submits that the trial court failed to comply with the purposes and principles of the 1989 Sentencing Act and erroneously denied his request for alternative sentencing, specifically probation or confinement followed by probation. We disagree.

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make on the defendant's own behalf about sentencing.⁴ Tenn. Code Ann. § 40-35-210(b) (2003); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act and (2) the trial court's findings are adequately supported by the record. State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). The burden of showing that a

⁴We note that the legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, said changes becoming effective June 7, 2005. However, the Defendant's crime in this case occurred prior to June 7, 2005, and the Defendant did not elect to be sentenced under the provisions of the act by executing a waiver of his ex post facto protections. See 2005 Tenn. Pub. Acts ch. 353 § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; Arnett, 49 S.W.3d at 257.

A defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (2003); see also State v. Fields, 40 S.W.3d 435, 440 (Tenn. 2001). The following considerations provide guidance regarding what constitutes "evidence to the contrary" which would rebut the presumption of alternative sentencing:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1) (2003); see also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. See id. § 40-35-103(5).

Because the Defendant received a Range II sentence length, he is not a standard offender. Therefore, he is not entitled to the presumption in favor of alternative sentencing. However, the Defendant is *eligible* for probation because his actual sentence is eight years or less and the offense for which he was sentenced is not specifically excluded by statute. See Tenn. Code Ann. § 40-35-303(a) (2003). The trial court shall automatically consider probation as a sentencing alternative for eligible defendants; however, the defendant bears the burden of proving his or her suitability for probation. See id. § 40-35-303(b) (2003). No criminal defendant is automatically entitled to probation as a matter of law. See id. § 40-35-303(b), Sentencing Commission Comments; State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would serve the ends of justice and the best interests of both the public and the defendant. See State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002).

In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. See id. If the court determines that a period of probation is appropriate, it shall sentence the defendant to a specific sentence but then suspend that sentence and place the defendant on supervised or unsupervised probation either immediately or after the service of a period of confinement. See Tenn. Code Ann. §§ 40-35-303(c), -306(a).

The trial court determined that incarceration was appropriate in this case. While the trial court correctly noted that the Defendant's criminal history is not particularly long, the Defendant is only twenty-two years old and has only been in this country since May of 2002. He has previously been placed on probation for reckless aggravated assault and violated the terms of his release. Measures less restrictive have recently been applied unsuccessfully to this Defendant.

The Defendant also employed a firearm during commission of the offense. See Tenn. Code Ann. § 40-35-114(10) (2003); see also *State v. Zeolia*, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996) (permitting use of enhancing and mitigating factors as relevant to Tennessee Code Annotated section 40-35-103(1) considerations). The trial court also noted that his previous conviction for aggravated assault involved the use of a firearm, and the Defendant was a convicted felon who should not be in possession of a firearm. Additionally, the Defendant admitted that he had a problem with drugs and alcohol and that he was intoxicated at the time of the shooting. These facts lend support to a determination that the Defendant's potential for rehabilitation is poor. The Defendant's addiction problems could be treated in a correctional facility.

Upon de novo review, we conclude that the sentence imposed is no greater than that deserved for the offense committed and is the least severe measure necessary to achieve the purposes for which the sentence is imposed. The record amply supports the trial court's decision to deny alternative sentencing. This issue is without merit.

CONCLUSION

Based upon the foregoing, we conclude that the trial court did not err in ordering total confinement. The sentencing decision of the Davidson County Criminal Court is affirmed.

DAVID H. WELLES, JUDGE